

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. C14-1038-JCC

ORDER

This matter comes before the Court on Amazon’s Motion to Compel (Dkt. No. 55), the FTC’s Motion to Compel (Dkt. No. 57), and Amazon’s Motion for a Protective Order and Limited Extension of Discovery Cutoff (Dkt. No. 59). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby orders as follows:

- 1) The FTC’s Motion to Compel (Dkt. No. 57) is GRANTED in part and DENIED in part;
- 2) Amazon’s Motion to Compel (Dkt. No. 55) is DENIED;
- 3) Amazon’s Motion for a Protective Order (Dkt. No. 59) is DENIED; although
- 4) The discovery cutoff is EXTENDED an additional thirty days after the date of this order.

1 **I. BACKGROUND**

2 Without reciting the factual background provided in the Court’s order on Amazon’s
3 Motion to Dismiss (Dkt. No. 14 at 2), the above-captioned matter is brought by the Federal
4 Trade Commission (“FTC”) alleging that Amazon’s billing of parents and other account holders
5 for in-app purchases made by children “without having obtained the account holders’ express
6 informed consent” is unlawful under Section 5 of the FTC Act, 15 U.S.C. § 45(n). (Dkt. No. 1, p.
7 11; *see also* Dkt. No. 48 at 1.)

8 The present discovery disputes arise out of (1) Amazon’s objection to producing over
9 100,000 audio recordings of customer service phone calls due to the immense cost of redacting
10 customer information from them, (2) Amazon’s request that the FTC respond via discovery
11 requests to issues related to the merits of its case, (3) both sides’ 30(b)(6) depositions, and (4)
12 already-ruled upon questions regarding the FTC’s investigation of Amazon’s competitors (*see*
13 Dkt. No. 69). (Dkt. Nos. 55, 57, and 59.)

14 **II. DISCUSSION**

15 **A. The FTC’s Motion to Compel**

16 The Court turns first to the FTC’s Motion to Compel. (Dkt. No. 57.) The FTC’s motion
17 consists of two requests: (1) first, that the Court compel the production of Amazon customer
18 service phone recordings and/or transcripts of those recordings, and (2) second, that the Court
19 compel Amazon to produce a Rule 30(b)(6) witness for the remaining topics set forth in the
20 FTC’s notice of deposition. (*Id.* at 2.)

21 **1. Customer Service Audio Recordings**

22 The FTC requests that Amazon produce the audio recording or text transcript of customer
23 service phone calls that relate to customer complaints regarding in-app purchases. Specifically,
24 the customer service phone calls at issue are those in which a customer complained about an
25 unanticipated in-app charge and received a refund. (*See* Dkt. No. 66 at 5–6.) The FTC has
26 apparently narrowed its original request to only customer calls designated by certain codes—

1 referred to as “wrap-up” codes—employed by Amazon to classify the customer service
2 interaction. (Dkt. No. 57 at 6.) In total, there are approximately 111,200 customer interactions
3 that meet the FTC’s description; the FTC requests recordings or transcripts of all of them. (*Id.*)
4 Averaging 6.75 minutes per call, Amazon predicts they amount to over 21,000 hours of audio.
5 (Dkt. No. 66 at 6, 10.) As Amazon argues, it is unlikely that the FTC would be able to actually
6 review this quantity of discovery. (*Id.* at 10.)

7 The parties dispute whether redaction of the customer calls is necessary. Amazon
8 opposes production of the calls due to the tremendous financial burden it faces if required to
9 redact and produce this volume of discovery. Amazon estimates a cost of \$1.3–3.7 million to
10 either “beep” out personally identifying details in the audio recordings of customer calls or
11 transcribing and redacting transcripts of the calls. (Dkt. No. 66 at 6–7.) The FTC argues that the
12 customer information need not be redacted; a protective order is in place in this case and the FTC
13 is a law enforcement agency. (Dkt. No. 57 at 8.) The chief basis for Amazon’s argument that
14 redaction is necessary is that it believes its customers are protected by the First Amendment and
15 the Video Privacy Production Act (“VPPA”), 18 U.S.C. § 2710. (Dkt. No. 66 at 10–11.)

16 Whereas Amazon has previously invoked the First Amendment protections of freedom of
17 association to oppose discovery requests in this litigation (*see* Dkt. No. 48 at 4–6), here it argues
18 that its customers’ purchases constitute expressive content protected by the First Amendment.
19 (Dkt. No. 66 at 12) (citing *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013)). While
20 video games may constitute expressive content, *see Brown*, 724 F.3d at 1241; *Brown v.*
21 *Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2733 (2011), the accidental purchases at issue
22 in this lawsuit are not a form of actual expression. As the FTC points out, the heart of this
23 dispute are purchases that Amazon customers *did not choose* to make. (Dkt. No. 70 at 6.)

24 The VPPA protects against the disclosure of “personally identifiable information,” which
25 is defined as “information which identifies a person as having *requested or obtained* specific
26 video materials or services . . .” 18 U.S.C. § 2710(a)(3) (emphasis added). Similarly, the VPPA’s

1 application to transactions a person “requests or obtains,” pertains to voluntary actions. *See In re*
2 *Nickelodeon Consumer Privacy Litigation*, 2014 WL3012873, at *11 – 12 (D.N.J. July 2, 2014)
3 (referring to video “choice” as warranting VPPA protection); 134 Cong. Rec. S5397-01 (May 10,
4 1988) (VPPA sponsor, Sen. Leahy, referring to protections to “read and watch what we *choose*”)
5 (emphasis added).

6 The Court concludes that neither the First Amendment nor the VPPA apply to customer
7 service calls regarding purchases that customers did not intend to make, at issue here. Even if
8 they did, the Court concludes that the FTC’s expected compliance with the entered protective
9 order alleviates any fear of misuse. (*See* Dkt. Nos. 16 and 17.) Redaction prior to turning the
10 recordings over to the FTC is not necessary. However, if later in this litigation the FTC seeks to
11 include personally-identifying details of Amazon customers in a court filing, it will be expected
12 to file such information under redaction or seal.

13 While redaction is not the solution, the Court also finds that the burden to Amazon
14 encompassed in producing such a large quantity of discovery material outweighs the benefit of
15 the FTC having access to all 111,200 files. While the Court does not adopt Amazon’s assertion
16 that “it is unlikely that the FTC would ever even use these files,” wholesale, neither does it
17 ignore the burdensome nature of producing such a vast amount of discovery where it is unlikely
18 to be used in its entirety. (Dkt. No. 66 at 10.)

19 Amazon has indicated that it is willing to produce a subset of the audio files sought by
20 the FTC, including: (1) all the calls pertaining to customers who sought and were denied a refund
21 for inadvertent in-app purchases (approximately 1,150), and (2) a randomly-drawn sample of
22 recordings from specified wrap-up codes (another 1,150). (Dkt. No. 66 at 6.) Amazon has not
23 explained how the randomly-drawn sample of recordings would be selected, or how to ensure
24 that they are representative of the entire pool of recordings in its records. (Dkt. No. 71 at 16–18.)

25 The Court hereby ORDERS Amazon to produce—to the extent it has not already done
26 so—unredacted copies of all customer service phone calls in which customers were denied a

1 refund. Amazon is also ORDERED to produce a representative sample of unredacted versions of
2 the remaining phone calls, those from customers who received a refund. The Court is of the
3 impression that this pool of remaining phone calls (from customers who received a refund)
4 consists of 111,200 calls consisting of nine specified wrap-up codes. (*See* Dkt. Nos. 57 at 6; 66 at
5 6.) Accordingly, the representative sample should consist of 11,120 files, or ten percent of the
6 total pool.¹ This sample should be representative in its composition: meaning, the number of files
7 associated with any given wrap-up code should be in-proportion to the number of calls with that
8 wrap-up code in the overall pool. The files are to be picked at random within these parameters.
9 Amazon may produce either the audio files or transcripts of these calls. Amazon is ordered to
10 produce these files within thirty (30) days of this order.

11 **2. Amazon's Rule 30(b)(6) Witness**

12 The FTC also moved the Court to order Amazon to provide a knowledgeable witness on
13 the 30(b)(6) topics to which it has not already testified. (Dkt. No. 57 at 7–8.) Amazon objected to
14 the FTC's deposition topics 1–4, 6–12, 14, 25, 29–37, and 40–41 on the basis that they were not
15 “described with reasonable particularity.” (Dkt. No. 57 at 8; Dkt. No. 59 at 5.)² However, the
16 FTC now represents to the Court that Amazon has agreed to make a witness available to testify
17 to the FTC's outstanding topics and that, accordingly, Amazon's motion for a protective order
18 (Dkt. No. 59) and the FTC's motion to compel Rule 30(b)(6) testimony can both be withdrawn.
19 (Dkt. No. 64 at 6.) If the parties have not already resolved this matter, they are expected to
20 schedule deposition on the remaining FTC topics (30, 31, 33, and 35) at a mutually-agreeable
21 time and location. This deposition—and all depositions—are to be completed within thirty (30)
22 days of this order.

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25 ¹ The Court intends this order to function such that if the total pool of calls is not 111,200, that Amazon produce a
sample of ten percent of however many calls there are in total.

26 ² Rather than include its opposition to the FTC's 30(b)(6) request in its response to the FTC's motion to compel,
Amazon filed its own motion for a protective order (Dkt. No. 59).

As detailed above, the FTC’s Motion to Compel (Dkt. No. 57) is GRANTED in part and DENIED in part.

B. Amazon’s Motion to Compel

Amazon also moves the Court to compel the FTC to respond to certain discovery requests. (Dkt. No. 55.) As Amazon puts it, “the discovery in question attempts to elicit the FTC’s position.” (*Id.* at 4.) The FTC has objected to many of Amazon’s requests for admissions (“RFAs”). (Dkt. No. 55 at 6–7.) By way of illustration, one RFA reads as follows:

Admit that with respect to Amazon’s billing practices for In-App Purchases, Amazon complied with Section 5 of the FTC Act as of November 15, 2011—when Amazon made Parental Controls available to all Customers.

(Dkt. No. 62 at 4.)

Requests such as this plainly call for a legal conclusion and are inappropriate. *See Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999); *Benson Tower Condo. Owners Ass’n v. Victaulic Co.*, 2015 WL 2208444, at *5 (D. Or. May 11, 2015) (“Although Plaintiff has nominally tied its RFAs to the facts of the case, the request remains a legal conclusion: whether or not the Victaulic products are defective . . .”).

Moreover, Amazon argues that its requests fit within Rule 36’s purposes of “weeding out facts and items of proof over which there is no dispute.” (Dkt. No. 55 at 9)(internal citation omitted). However, the requested admissions *are* in dispute—in fact, they go to the very heart of the lawsuit: whether Amazon’s in-app purchase billing practices violated the FTC Act.

All of the RFAs disputed in Amazon’s motion seek a legal conclusion in one of two ways: either (1) asking the FTC to admit that Amazon’s billing practices comply with Section 5 of the FTC Act for various reasons³ or (2) asking the FTC to admit that Amazon practices “meet or exceed” the “express, informed consent” requirements set forth in an FTC-Apple or FTC-

³ (Dkt. No. 56 at 43–48, RFA Nos. 1–8, 11–12, 15.)

Google settlement agreement.⁴⁵ Because the Court upholds the FTC's objections that these RFAs seek to draw a legal conclusion, the Court need not reach Amazon's dispute with the FTC's other objections regarding the phrase "billing practices" or whether requests were overbroad.

Amazon's Motion to Compel (Dkt. No. 55) is DENIED.

C. Amazon's Motion for a Protective Order

As discussed above in Part II(A)(2), the parties have represented to the Court the Amazon's Motion for a Protective Order (Dkt. No. 59) is moot based on a subsequent agreement. (Dkt. No. 64 at 6.) Amazon is expected to comply with that agreement and schedule a Rule 30(b)(6) deposition on the remaining topics noted by the FTC. In addition to requesting a protective order over its Rule 30(b)(6) deposition, however, Amazon's motion seeks an extension of the discovery cutoff.

In requesting an extension of the discovery cut-off date, Amazon argues that such an extension is necessary for (1) the FTC to supplement its discovery responses (as discussed above); (2) the FTC to produce documents relating to Amazon's competitor, Apple; (3) for Amazon to produce the audio recording files discussed in Part II(A)(1) above. (Dkt. No. 59 at 6–7.) Factual discovery formally closed on September 28, 2015. (Dkt. No. 34.)

While the FTC is not ordered to supplement its discovery responses (*see* Part II(B)), or turn over documents relating to Apple (*see* Dkt. No. 69), the Court does find a limited extension of factual discovery necessary in order to ensure that (1) Amazon produces the audio files discussed in Part II(A)(1); and (2) that the parties schedule any remaining Rule 30(b)(6) depositions. To achieve these results, the discovery deadline is extended to run an additional thirty (30) days after the date of this order.

This order represents the third time the Court has been called upon to intervene in a

⁴ (Dkt. No. 56 at 46–48, RFA Nos. 9–10, 13–14.)

⁵ The Court has already granted a protective order with respect to FTC settlements with Amazon competitors. (Dkt. No. 69.)

1 discovery dispute in this case. (*See* Dkt. Nos. 48 and 69.) The parties have, to date, filed six (6)
2 discovery-related motions. (*See* Dkt. Nos. 24, 49, 55, 57, 59, and 75.) The Court has little
3 patience for such disputes and reminds the parties that it will not look favorably on future filings
4 or requests to extend the case deadline. Failure to comply with Court orders, to follow the
5 Federal Rules of Civil Procedure, or to litigate in good faith may result in sanctions.

6 **III. CONCLUSION**

7 For the foregoing reasons:

- 8 1) The FTC's Motion to Compel (Dkt. No. 57) is GRANTED in part and
9 DENIED in part;
- 10 2) Amazon's Motion to Compel (Dkt. No. 55) is DENIED;
- 11 3) Amazon's Motion for a Protective Order (Dkt. No. 59) is DENIED;
12 although
- 13 4) The discovery cutoff is EXTENDED to run thirty (30) days after the date
14 of this order.

15 DATED this 23 day of November 2015.

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22 John C. Coughenour
23 UNITED STATES DISTRICT JUDGE
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